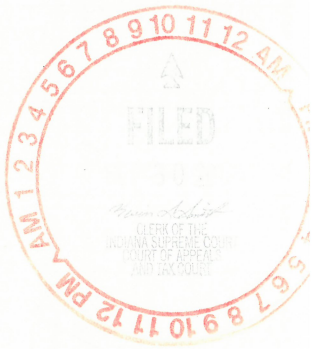

IN THE
INDIANA SUPREME COURT

Case No. 49A04-1305-CT-000267

PHYLLIS DODSON, as Special Administrator of the Estate of EBONI DODSON, Deceased.	)	Appeal from the Marion Superior Court II
Appellant,	)	
v.	)	Case No. 49D02-1009-CT-041815
SEVEN CORNERS, INC.	)	Hon. Judge Theodore M. Sosin
Appellee.	)	

APPELLANT'S REPLY TO APPELLEE'S RESPONSE TO PETITION FOR TRANSFER

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ARGUMENT

A. This is an Undecided Question of Law in Indiana

Not once in Seven Corners' Response to Dodson's Petition to Transfer did it address the fact that Carlson was intoxicated at the time of the accident; that his intoxication occurred during the scope of his employment; or the fact that his intoxication occurred as a result of doing his job which on this night and on previous occasions entailed dinner and drinks to get new business.

Carlson's work related intoxication is the fact that removes this case from *Biel, Inc. v. Kirsch* (1959), 240 Ind. 69, 161 N.E.2d 617 and it's progeny. This case involves an intoxicated employee; an employee that consumed alcohol to the point of intoxication within the scope of his employment; an employee that works for a company that courts business over dinner and drinks. Curt Carlson drank to the point of intoxication while courting new business for Seven Corners. (Appellant's App. 48). Carlson testified that Seven Corners has had business meetings over dinner and drinks in the past and that is what they were doing the night of Eboni Dodson's death. (App. 45).

Again, none of the Indiana cases cited share this one incredibly vital fact. No Indiana cases citing the "going and coming" rule involve an employee that drank to the point of intoxication within the scope of his employment and then drove home. This fact cannot be ignored. This case cannot be lumped in with *Biel*.

The Court of Appeals cited two cases from outside this jurisdiction that involved employees driving home after allegedly consuming alcohol within the scope of employment. The Court did not address or cite to the multiple cases cited by Dodson that adopted multi-part tests to replace the "going and coming" rule in instances involving alcohol consumption within

the scope of employment. The Indiana Supreme Court needs to take a position on this issue.

B. Indiana Precedent as Applied Herein by the Court of Appeals is in Need of Reconsideration

While the "going and coming" rule is a well founded rule for limiting the vicarious liability of employers; its application to the facts of this case is not appropriate.

According to Prosser and Keeton, as cited by Indiana Courts in the past, *Shelby v. General Motors Corp,* 533 N.E.2d 1296, 1298 (Ind. Ct. App. 1989), the doctrine of respondeat superior is to "properly allocate the economic costs of doing business." *Id.* at 1298 (quoting Prosser and Keeton on Torts (5th ed.) § 69, p. 500). Seven Corners was "doing business" on the evening of February 22, 2010. On this evening and on previous occasions Seven Corners did business over dinner and drinks. (App. 45). There is no evidence in the record that would indicate the consumption of alcohol at the meeting was unanticipated. The "costs of doing business" in this manner should include a hotel room for the participating employees, a car service for employees that consume alcohol, a taxi, or the expense of another employee to attend who would abstain from the consumption of alcohol. Tragically, the cost of doing business over dinner and drinks on the subject night was the life of Eboni Dodson, and as such Seven Corners should be responsible for this "cost." The "going and coming" rule does not "properly allocate the costs of doing business" in the case at bar.

Trial by jury is the bedrock of our judicial system. Incorrectly applying the "going and coming" rule to this case robs the Dodson family of this most basic foundation of our system. Adopting a simple multi-part test similar to other jurisdictions would remedy this injustice. This Court could develop a multi-part test that allows the jury to decide the fact sensitive issues that all respondeat superior cases entail. The "going and coming" rule is not proper precedent for this

case.

C. The "going and coming" rule as Applied to this Case is in Conflict with *Barnett v. Clark*

Seven Corners argues Dodson is attempting to use this Court's language in *Barnett v. Clark*, 889 N.E.2d 281 (Ind. 2008) to "expand the time frame within which an employee may subject an employer to imputed liability." Response to Appellant's Petition to Transfer, 6. The consumption of alcohol to the point of intoxication within the scope of employment is what logically "expand[s] the time frame" and removes this case from the simple "going and coming" rule analysis.

The *Barnett* language at issue is "in order for an employee's act to fall within the scope of employment, the injurious act must be incidental to the conduct authorized or it must, to an appreciable extent, further the employer's business" *Id.* at 283.

This is the crux of the question presented to the Court. Seven Corners argues Dodson is attempting to "expand the time frame" using the *Barnett* decision. The time frame alluded to is the "going and coming" rule and the language in *Barnett* does indeed conflict with the "going and coming" rule as applied to the facts of this case. As Dodson has argued throughout this appeal, the effects of alcohol intoxication do not magically end when the business meeting ends. Applying the *Barnett* language to the case at bar makes the conflict apparent. The alcohol was consumed within the scope of employment; the consumption was authorized by the employer (the employer paid for the alcohol and certainly could have told his employee if he was not to consume alcohol at the business meeting); and driving while intoxicated is certainly incidental to consuming alcohol at a business meeting in which the employee knew he was going to drive home.

CONCLUSION

The Court should grant transfer, vacate the opinion of the Court of Appeals, and remand to the trial court for further proceedings.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this Petition contains no more than 1,000 words.

Ryan K. Johnson

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following via United States mail, proper postage affixed, this 30th day of September, 2014.

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